(2)

No. 03-1068

Supreme Court, U.S.
FILED
MAR 26 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

NIPPON KAIJI KYOKAI CORPORATION,

Petitioner,

v.

OTTO CANDIES, L.L.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OTTO CANDIES' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

ALFRED J. RUFTY III
Counsel of Record

1450 Poydras Street, Suite 1500
New Orleans, Louisiana 70112
(504) 525-7500

Counsel for Respondent

BEST AVAILABLE COPY

CORPORATE DISCLOSURE STATEMENT

Respondent, Otto Candies, L.L.C., has no parent corporation and is not partially owned by any publicly-traded corporation or entity.

I. ARGUMENT

A. This Case Is Not Worthy of Review, Presenting a Mere Factual Dispute Under an Established Legal Standard.

In its petition, NKK[1] cannot even pretend that any of the considerations set forth in Supreme Court Rule 10 for granting review on certiorari apply in this case.

Grasping at straws, NKK resorts to hyperbole and proclaims that "disastrous results" will flow from the Fifth Circuit's decision in this case. To the contrary, the ruling below was really quite ordinary: the U.S. Fifth Circuit Court of Appeal affirmed the district court's ruling that NKK, a marine classification society, was liable in negligent misrepresentation under the principles of Restatement (2d) of Torts Section 552. In its brief filed with the Fifth Circuit, NKK itself acknowledged that the negligent misrepresentation criteria of Section 552 were appropriately applied in this maritime case.[2]

Although NKK may dislike the factual findings that Section 552's criteria were satisfied in the evidence, this Court is not in the business of revisiting factual disputes. Even if it were, the demanding prerequisites of Section 552 plainly were met. Otto Candies won because it proved that (1) NKK, in the course of its profession, supplied false information for Otto Candies' guidance in a business transaction; (2) NKK failed to exercise reasonable care in gathering the information; (3) Otto

---

[1] Nippon Kaiji Kyokai Corporation.

[2] The Fifth Circuit opinion confirms that "the parties assumed that NKK can be held liable under general federal maritime law for the tort of negligent misrepresentation." *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 534 (5th Cir. 2003).

Candies justifiably relied on the false information in a transaction that NKK intended to influence; and (4) Otto Candies thereby suffered pecuniary loss.

B. The Burden of Proof Applied Was Severe, Constricting Future Claims.

To ensure that the Restatement test is applied with due stringency, the Fifth Circuit's opinion (written by Judge Edith Jones) elaborates that:

> [T]he Restatement expressly limits liability to a select group of nonclients who the misinformer *actually knows* will receive inaccurate information. . . . [T]hat it was . . . foreseeable that a nonclient . . . would rely on the information is insufficient. Furthermore, the information supplier's liability under section 552 is limited to those persons whom the engagement is intended to benefit. (emphasis original).[3]

By confining liability to those whom the engagement is intended to benefit, the Restatement rule ensures that the supplier of the information will receive advance notice of potential third-party claims, thereby allowing it to assess its potential liabilities and "make rational decisions regarding the undertaking."[4] Indeed, the Fifth Circuit expressly rejected any implication that classification societies may be liable in negligent misrepresentation to parties – "including without limitation seamen, longshoremen, passengers, cargo owners, and charterers" – who rely upon a classification

---

[3] *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, 346 F.3d at 535-36 (emphasis in original).

[4] *Otto Candies, L.L.C.*, 346 F.3d at 537 (quoting *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 11 Cal. Rptr. 2d 51, 834 P.2d 745, 769 (Cal. 1992)).

survey without the society's actual knowledge that the survey was being provided for that party's guidance and benefit.[5] In short, the Fifth Circuit applied a demanding burden of proof, and it will be the rare case in which it is met. Hardly have the floodgates been flung open.

C. NKK's Citations Are Meaningless.

Evidently NKK had difficulty finding materials to support its prophecy of doom. For lack of anything better, NKK relies on a smattering of minor industry publications and on distortions of the Fifth Circuit's opinion below. But neither resource remotely supports NKK's thesis that the ruling will fundamentally disrupt maritime commerce. NKK derives support from the opinion below only by mischaracterizing it. NKK writes:

> The court below was right to foresee that its opinion would undermine the shipowners' non-delegable duty to maintain a seaworthy vessel, deter classification societies from performing their most-needed work, and demand a reevaluation of the industry's economic system.[6]

The Fifth Circuit foresaw no such things. Does NKK seriously expect anyone to believe that the Fifth Circuit predicted these dire consequences from its own opinion? The argument is ludicrous. What the Fifth Circuit did do was point out the potential dangers of subjecting classification societies to "*undue* liability,"[7] which is to say liability in circumstances other than these. The court's point was that it was safeguarding

---

[5] *Otto Candies, L.L.C.*, 346 F.3d at 537.

[6] See *NKK's Petition for a Writ of Certiorari*, at 20.

[7] *Id.*, at 535.

against the potential dangers by sanctioning liability only in very narrow circumstances. (In other words, the court said essentially the opposite of what NKK reports).

NKK also cites a handful of minor industry publications that have remarked upon the Fifth Circuit ruling and, given this interest, concludes that the case "practically demands this Court's attention."[8] NKK wrongly equates moderate industry interest with cert-worthiness. Judging from NKK's petition, the literature does not even criticize the case as wrongly decided; the best NKK can muster is to say that one of the articles "expressed implicit surprise" at the Fifth Circuit's decision.[9]

Notably, NKK is unable to cite a single case that stands in direct conflict with the ruling below. In an attempt to demonstrate error, NKK actually resorts to analogizing to a discussion in a treatise on real property regarding the distinction between a "quit claim" deed and a "warranty deed."[10] NKK then argues about third-party beneficiary status under contracts – a matter that relates to contract claims and is irrelevant in this tort suit for redress of negligent misrepresentations.

In short, NKK offers nothing that warrants this Court's attention. It simply wants its business to be elevated above others with a special immunity from liability for negligent misrepresentations. There is no basis in precedent or justice for such special treatment. If classification societies wish to avoid liability of the sort

---

[8] *Id.*, at 21.

[9] *Id.*

[10] *Id.*, at 15.

recognized below, they need only refrain from conducting business in a manner violative of Restatement Section 552. That is not too much to ask. And when the onerous requirements of Section 552 are met, it is entirely appropriate that the wronged party be afforded a remedy.

NKK professes to act in the public interest. It is nevertheless in a competitive business, as numerous classification societies around the world vie for market share. Might its surveyors occasionally be tempted to overlook or downplay a deficiency here or there to benefit a repeat customer? Is it merely coincidence here that NKK's blatantly deficient survey benefitted a fellow Japanese company (a future business prospect) whose vessel was being sold to an entity on the other side of the world? If such temptations are conceivable, they could only be magnified by a rule immunizing classifications societies from liability for proven negligent misrepresentations. The strict demands of Restatement Section 552 are protection enough.

The Fifth Circuit properly allowed a remedy, and there is no reason for the Court to waste time trifling with this case.

II. CONCLUSION

This Court surely has more pressing business than to address NKK's unjustified request for a new jurisprudential rule entitling it to negligently misrepresent the condition of vessels with impunity. NKK's petition for a writ of certiorari should be denied.

Respectfully submitted,

ALFRED J. RUFTY III
1450 Poydras Street, Suite 1500
New Orleans, Louisiana 70112
(504) 525-7500

Counsel for Respondent,
Otto Candies, L.L.C.